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ABSTRACT

The third in this special series on constitutional themes, this document focuses on justice. "Due Process: What Is It?" (P. McGuire) examines the concept of due process as provided in the Fifth and Fourteenth Amendments and provides lesson plans for a five-day unit on that topic. "Making Government Fair" (G. Galland) explains how due process helps keep government accountable. A lesson plan for grades K-6, "Making Wrongs Right" (D. Greenawald), helps primary students analyze situations where a wrong has occurred and offer recommendations for corrective justice. "What is Procedural Justice?" contains lesson plans for middle and secondary school students adapted from "Law in a Free Society" curriculum units. They are concerned with the fairness of procedures used to gather information and make decisions. "Justice: Developing Reasonable School Policies" (K. A. Sprang) is a lesson plan for secondary students that focuses on the problem of drug and alcohol abuse and proposed drug-testing policies as related to schools. A sample policy requiring random drug testing for athletes is included. "Right to Counsel" (A. L. Lockwood; D. E. Harris) is a lesson plan for grades 9-12 that should help students explore the role of lawyers in helping assure due process and the ethical dilemmas faced by lawyers. "Searches without Warrants" (S. Jenkins), a lesson plan for grades 9-12, explores the questions "What is a reasonable search?" and "Can a search without a warrant ever be reasonable?" (JB)

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# Justice

## Constitutional Update

SO 020 377

American Bar Association
Special Committee on Youth Education for Citizenship



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Patricia McGuire

# Due Process: What is It?

## Some tips on how to present a tricky topic

"Who will police the police?" Even at this paraphrased distance of several thousand years, the concern expressed by Plato over the potential excesses of the Republic's "guardian" class has a familiar ring. Two hundred years ago, the Constitution's authors, facing the same concern, decided to put their fate, and ours, in a "government of laws, not men." A written Constitution, not a philosopher king (or queen).

Even so, upon completing the main body of the written document, the framers realized that something was still missing. The government of laws, so logical on paper, was to be implemented by men and women none the less, and so would be subject to the infinite variety of human interaction, conflict, and excesses. How should the governors be governed? The answer was proposed in the Bill of Rights.

Beyond enumerating specific individual fundamental rights, such as freedom of speech and religion, beyond mandating specific processes for certain governmental interactions with individuals, such as the requirement for grand jury indictments, the authors of the Bill of Rights recognized the necessity to create a watchdog to guide and restrain all government encroachment upon the fundamental human interests in life, liberty, and property. The watchdog is "due process of law."

This ultimate limitation of arbitrary governmental action lies in the Fifth Amendment: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." Over 100 years ago, this same language, with one important variation, was again included in an amendment to the Constitution: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." The Fourteenth Amendment operates to impose upon state governments the same due process watchdog as the Fifth Amendment imposes upon the federal government.

### What Is Due Process?

Neither the words "due process" nor the concept were new in 1791. The conceptual roots lay in King John's Magna Charta, and the words evolved through later centuries. Yet even today, 766 years after Runnymede, 190 years after the ratification of the Constitution and Bill of Rights, debate rages: what is due process of law, and what does it require of our government? What does due process require of "we the people" who are ultimately responsible to make it work?

The Supreme Court struggles with this issue annually: When must an attorney be made available? When must statements of an accused be excluded from a trial? What can a reporter publish prior to a trial? Nor are the questions all related to criminal processes. Perhaps even more complex and subtle questions arise in the civil areas: What kinds of procedures are required before a federal agency imposes regulations on a private industry? What processes must a zoning commission pursue before granting a variance? May state law allow a tenant to be evicted without notice or a hearing?

The preceding paragraph illustrates the first important fact about due process for teachers of law-related education: due process is not an isolated issue to be taught in a vacuum. Due process is a concept which cuts a broad swath through all legal topics; it's not just for the Bill of Rights teachers.

The second important fact about due process lies in its very definition. The right to due process means that the government cannot infringe upon citizen rights without fair procedures. Fair procedures have been interpreted to mean, at the very minimum, that the government must give the citizens some notice of the actions it plans to take, and also that the citizens must have an opportunity to respond, to be heard.

Due process does *not* mean that the *result* of the fair procedures will be favorable to the citizen. Due process does, however, assume that the result of fair procedures will be the achievement of justice.

## When Is the Process Due?

The first step in coming to an understanding of how due process works is to ask: Is the citizen entitled to fair procedures? The answer to this question depends upon the extent to which a proposed government action will infringe upon a citizen's life, liberty, or property, including one of the specifically enumerated individual rights listed in the Constitution.

In criminal actions, in which the citizen faces a potential loss of liberty, the due process requirement is clear, and elucidated at some length in the Fourth, Fifth, and Sixth Amendments, as will be discussed below. However, with regard to noncriminal actions, the response is not at all clear or consistent. Civil due process cases are most immediately concerned with the nature of the citizen's interest threatened by government action. For example, in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the initial question was whether a welfare recipient had a property interest in public assistance payments. Justice Black, in dissent, said no, that such payments were not a property entitlement; however, Justice Brennan for the majority said yes.

Once the nature of the citizen's interest is resolved, the next question is whether that interest is being threatened with such a degree of encroachment as to warrant requiring the government to follow due process procedures. Again, in *Goldberg* the Court said that, if welfare recipients were not accorded some minimal due process prior to the termination of their benefits, the resulting harm would be "brutal" and "unconscionable" to those recipients who did not deserve to have their rights terminated.

A finding that some procedural due process is required has been significant in reshaping the law with regard to the treatment of juveniles (*In re Gault*, 387 U.S. 1 [1967]; *In re Winship*, 397 U.S. 583 [1970]; *McKeiver v. Pennsylvania*, 403 U.S. 528 [1971]); the right of unmarried fathers to have a say in the care and adoption of their children (*Stanley v. Illinois*, 405 U.S. 645 [1972]; *Caban v. Mohammed*, 47 U.S.L.W. 4462 [1979]); confinement of mentally ill persons (*O'Connor v. Donaldson*, 422 U.S. 563 [1975]); repossession of consumer goods (*Fuentes v. Shevin*, 407 U.S. 67 [1972]); abortion rights of minors (*Bellotti v. Baird*, 442 U.S. 622 [1979]); public education and student discipline (*Goss v. Lopez*, 419 U.S. 565 [1975]; *Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 [1978]); and a host of other civil law issues.

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## What Process Is Due?

Once courts decide that some due process is required to protect the interests of citizens in a situation of potential governmental infringement, the question arises: What kinds of procedures are required? Again, in the criminal due process area, the actual procedures are fairly specific, although even specific guarantees, such as the right to counsel, have required extensive interpretation. For the areas in which some civil due process is required, the issue, once again, is neither clear nor consistent. While courts will order only "minimal" due process, the procedure minimally allowed for a student threatened with suspension may not satisfy the interests of a welfare recipient about to have his or her payment terminated.

For the criminally accused, the process which is due is embodied in the concept of a fair trial: a speedy, public hearing before an impartial judge and a jury of one's peers; an adversarial process, in which the accused, through the effective assistance of counsel, may confront and cross-examine his or her accusers, and present evidence in defense; a process in which the accuser must prove the guilt of the accused, beyond a reasonable doubt.

While all of these required procedures may seem clear in the plain meaning of the Fifth and Sixth Amendments, applying the procedures can become complex, giving rise to constitutional cases. Legislators, as well as courts, continue to wrestle with the definition of a "speedy" trial. A "public" trial has been a source of controversy in recent years, particularly as the Supreme Court has tried to strike a balance between the rights of the defendant and those of the press (*Gannett v. DePasquale*, 443 U.S. 368 [1979]; *Richmond Newspapers v. Virginia*, 48 U.S.L.W. 5008 [July 2, 1980]). A "public" trial takes on a new meaning with the most recent Court decision allowing televised criminal trials (*Chandler v. Florida*, 49 U.S.L.W. 4141).

The "right to counsel" must be accorded by states and the federal government in felony cases (*Gideon v. Wainwright*, 372 U.S. 335 [1963]), and in misdemeanor cases in which imprisonment is a possibility (*Argersinger v. Hamlin*, 407 U.S. 25 [1972]). The right to counsel has been intimately linked to the right to remain silent, i.e., not to incriminate oneself, and this powerful duo has resulted in the far-reaching *Miranda* decision (*Miranda v. Arizona*, 384 U.S. 426 [1966]) and 15 years of subsequent interpretation and narrowing (*Oregon v. Mathiason*, 429 U.S. 492 [1977]; *Brewer v. Williams*, 430 U.S. 387 [1977]; *Rhode Island v. Innis*, 48 U.S.L.W. 4506 [1980]). These decisions have had significant impact on police procedures as well as on the admissibility of evidence at trial. Similarly, the continuing interpretation of the Fourth Amendment through years of cases has stated and restated procedural norms for issuing warrants and conducting warrantless searches.

As this sampling of criminal issues and cases illustrates, while the elements of criminal due process are outlined in the Fourth, Fifth, and Sixth Amendments, their actual implementation is not static, but subject to change with time and interpretation. This flexibility gives rise to continual change in actual procedures used by police and courts.

The Constitution does not provide a similar outline for the process due in civil matters, aside from the Seventh Amendment's provision for a right to a jury trial in all civil cases in which the matter in dispute is in excess of 20 dollars. The forum for vindicating a civil due process right is not necessarily the courtroom, and the arbiter is not necessarily wearing judicial robes.

In determining the elements of civil due process, the courts use a balancing test to decide what procedures are minimally necessary, in a given case, to afford the citizen rightful protection without at the same time imposing more expense and burden on the government than is necessary. The traditional forms of criminal due process, such as right to counsel and an impartial judge, are used as a guide, but not uniformly imposed.

Civil due process, in its most basic form, may be satisfied through some form of notice, and an opportunity for a hearing. The actual form of the notice and hearing may vary widely. For example, in school suspension cases, the *Goss* due process standard may be satisfied through a corridor encounter between a student and principal, in which the principal informs the student that suspension is impending for a rules infraction, and the student counters with, "But I did it because . . . etc."

On the other hand, the *Goldberg* deci-

sion says that before cutting off public assistance payments to a welfare recipient, the recipient must have some opportunity for a hearing before an impartial person, at which counsel may be present, and the claimant may confront and cross-examine witnesses.

With all of these varying judicial interpretations of what constitutes minimal due process in a given case, however, it is important to remember that the judicial decree orders only the *minimum*. Nothing prohibits the government agency from doing more than the minimum. For example, despite the *Goss* minimums, many school systems now require more consistent, semi-formal or even formal hearing procedures.

## A Few Notes to Teachers

While the preceding material is offered as a guide to the meaning and shape of due process, it is not, of course, comprehensive. For students, "due process" can sound like a confusing, jargon-laden idea. In the initial approach to the concept, simplicity may be the best route. Once students gain facility with thinking and speaking about "due process" as meaning "fundamental fairness" or "fair procedures," they will be better able to understand the layering-over of issues which interact with due process.

Remember that due process does not judge the result directly: the principal may still suspend the student; the welfare recipient may still not get the benefits; the accused may still go to jail. The concept of due process assumes, to a certain extent, that a genuinely fair procedure, with a result based solely on the evidence adduced through that procedure, will achieve justice.

However, keep in mind that factors other than strictly procedural deficiencies—such as discrimination—may affect the fairness of a hearing. While this article does not discuss the relationship between due process and equal protection, the two frequently intertwine to form a web of protection. An objectively fair process may violate equal protection if the decision-maker allows the process to be a sham, and bases a final decision on prejudices which were not revealed in the course of the proceedings.

On the other hand, due process may help remedy a denial of equal protection, using fair processes in place of traditionally arbitrary decision-making. For example, the Supreme Court has ruled that a blanket maternity leave policy, while administratively convenient, discriminated against pregnant women by presuming that all pregnant women weren't capable of teaching beyond the sixth month of pregnancy. Rather than striking down the rule on equal protection grounds, however, the Court determined that the policy violated the women's right to due process, and ordered the school boards to "employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty . . ." (*Cleveland Board of Education v. LaFleur,* 414 U.S. 632 [1974]).

As with other individual liberties, the due process concept cuts across the spectrum of legal issues a law-related education course might deal with. Whether teachers and students are considering consumer rights, family affairs, or criminal justice, questions continually arise regarding the necessity and adequacy of notice and hearing procedures.

While, of necessity, teachers may include due process considerations when teaching any of the substantive areas, teachers may also opt to teach a separate due process unit, perhaps as part of a larger unit on the Bill of Rights. The following material offers sample goals, objectives, and teaching strategies for a five-day due process unit. The strategies represent a wide variety of legal issues, and so may individually be incorporated into units on specific subjects like criminal law.

## Goals and Objectives for Due Process Unit

As a result of the objectives and activities in this unit, students will develop an understanding of the term "due process," comprehension of the role of due process in our system of government, and an ability to recognize the practical applications of the due process guarantee in citizens' everyday issues.

Specifically, through the activities in this unit, students will be able to:

(1) define the term "due process" and identify the sources of the term in the U.S. Constitution;

(2) describe situations in which they have encountered, or been deprived of, due process;

(3) analyze a variety of civil and criminal factual situations in order to determine whether the due process guarantee should be applicable;

(4) analyze opinions of the Supreme

*". . . broiled breast of chicken, baked potato, hold the butter, light salad, vinegar, no oil—are we still under 1000 calories?"*

Court applying, or denying application of, the due process guarantee to civil and criminal cases;
(5) compare their own opinions regarding the scope of due process to the Supreme Court rulings;
(6) interpret and apply the direction of a court to redraft a statute to create provisions for constitutional procedures;
(7) apply and synthesize their knowledge about due process by participating in a simulated administrative hearing process.

The following activities assume that the students are familiar with the difference between civil and criminal law.

# Day 1.

## Recognition and Definition Exercises

Through this series of exercises, students will learn to define "due process," to identify the sources of due process in the U.S. Constitution, to identify due process encounters in their own experience, and to analyze whether given factual situations require constitutional due process.

(1) *Definition Brainstorm*

Step 1: Teacher writes "Due Process" on board.

Step 2: Students write a one sentence definition.

Step 3: Students read their answers, while teacher lists responses on board.

Step 4: Looking at all the responses, teacher asks for student consensus on one universal definition.

(2) *Identification of Sources of Due Process*

Step 1: Teacher asks students to identify the source of their definitions of due process. List on board as responses are given.

Step 2: Reading of the Fifth and Fourteenth Amendments. Teacher asks a student to read aloud.

Step 3: Discussion Questions:
What does the Fifth Amendment say? What does the Fourteenth Amendment say? What is the difference between the Fifth and Fourteenth Amendments?
(At this point, depending upon time and prior knowledge of the class, teachers may give a brief explanation or reminders regarding the history of the original Bill of Rights, the original intent of the Fourteenth Amendment, and the Supreme Court's later interpretation of the Fourteenth Amendment as making the Bill of Rights applicable to the states, in addition to the federal government.)

Step 4: Teacher asks class to discuss meaning of "life, liberty, and property," and to identify other places in the Constitution where aspects of these interests are also protected (i.e., Bill of Rights).

(3) *Identification of Personal Due Process Experiences*

Step 1: Teacher asks students to think about instances in which they (or someone they know) have been treated fairly or unfairly by a public agency.

Step 2: Volunteers recite their experiences (examples might include encounters with the police or juvenile justice system; a summer job or other work experience; a consumer problem; or a school discipline experience).

Step 3: After hearing each experience, teacher discusses with class why each example of treatment was fair or unfair; what could or should have been done differently.

(4) *Problems for Analysis*

Given each of the following problems, students should determine whether the citizens have a right to due process, and, if so, what the procedures should be.

a. An unwed father does not want his girlfriend to put their child up for adoption, but the state law requires only the mother's consent for the adoption of illegitimate children.

b. A tenant has just received notice that the private owner of the building has sold it to a developer for the purpose of converting it to a condominium. Local housing law is silent on the issue of condominium conversion.

c. Residents of a local neighborhood have complained for several weeks about being disturbed by crowds of teenagers hanging out in the street and playing radios at night. One night the police spot three 15-16 year old youths sitting on the curb, and take them to the local police station for loitering.

d. Many years ago, the Zoning Commission allowed an old chemical dump to be rezoned for a new housing development. After a recent rash of serious illness among the residents of the development, the Board of Health declares that the development must be closed and destroyed. The residents are told to sell their homes.

e. The local transit system has announced that it will raise fares by 25 cents. A group of regular commuters thinks this is unfair.

(To teachers: please note that your local or state law or regulations may differ from the examples cited above. Please tell the students to assume the existence of the problem as stated. After the students state whether the citizens *should* have a due process right [is the government denying them life, liberty, or property without due process?], and what procedures should be used, then it would be appropriate to discuss your local law and procedure.)

# Day 2.

## Case Studies

Through the use of case studies, students will be able to analyze sets of facts to identify due process and substantive issues, to apply their knowledge of due process in formulating their own opinions about how the cases should be decided, and to compare the rulings of the Supreme Court to their own opinions and analyses.

### Case #1: Criminal Due Process

*FACTS:* Albert Jones was apprehended by the police shortly after a murder was reported. Jones fit the description of the suspect, and was not far from the park where the victim, Charley, was found. At the time the police arrested Jones, they advised him of his *Miranda* rights. During the ride back to the police station in the scout car, one of the police officers who was sitting beside Jones in the back seat said, "I sure hope that the guy who shot old Charley didn't leave his gun in that playground." Jones nodded silently. "Hey, Jones, you got any kids?" asked the officer. Jones smiled, and murmured, "Yeah, three." The officer was silent for a minute, and then commented, "It sure would be terrible if some kids

*"Cut me off when I start beating you up."*

found a gun lying around that playground."

Jones was silent for a few minutes, and then told the officer to take him to the park. The scout car turned around. At the playground, Jones led the police to a gun hidden under a bush. The police testimony and the gun (which bore Jones's fingerprints and matched the bullet that killed Charley) were introduced into evidence at the trial. Jones was convicted and sentenced to life in prison.

*Questions for Discussion*

(1) What are the most important facts in this case?

(2) Why do you think the officer was talking to Jones?

(3) Did Jones voluntarily lead the officers to the gun?

(4) How might the legal issue in this case be stated?

(5) What does due process have to do with this case?

(6) Should Jones's attorney appeal this case? Why or why not? If the case is appealed, what arguments will be made in Jones's behalf?

(7) If the case is appealed, what will the government argue?

(8) If you were the appeals court judge, how would you decide? Why?

(*Note:* In *Rhode Island v. Innis*, 48 U.S.L.W. 4506 [1980], on a similar set of facts to those set forth in this problem, the Supreme Court held that off-hand remarks by a police officer did not constitute an interrogation, and that the defendant's incriminating actions and statements were totally voluntary. However, in *Brewer v. Williams*, 430 U.S. 387 [1977], the Court ruled differently on a similar set of facts. In *Brewer* the comments of a police officer appealed to the religious scruples of the accused, ultimately resulting in the accused's making incriminating statements and leading the police to the victim's body. The Supreme Court held that this was an impermissible interrogation, and a violation of the defendant's Sixth Amendment right to counsel.)

## Case #2: Civil Due Process (Unmarked Opinion Strategy)

*FACTS:* Hilda Peterson is an unmarried mother of three children, ages six months, three, and four and one-half years. Since the birth of her first child, Hilda has been receiving public assistance payments under the Aid to Families with Dependent Children program. Hilda is unemployed. Hilda's social worker has urged her to return to school to complete her high school diploma and acquire some secretarial training. Additionally, the case worker has urged her to try to get a job, and the social worker even arranged for several jobs, which Hilda refused. Hilda feels that she cannot leave her children at this stage in their lives.

Six months ago, the social worker reported to the AFDC Board that Hilda was not cooperating with his efforts to get her a job. Several weeks after that report, AFDC stopped making payments to Hilda. When Hilda went to the AFDC Board to protest, she was told that a hearing would be scheduled, if she desired to appeal the decision. The hearing, scheduled for two weeks later, consisted of a member of the AFDC Board, the social worker, and Hilda.

Hilda was never advised as to whether she could bring an attorney or other representative, and the few guidelines available for the hearing process do not mention attorneys. The guidelines simply state that, after payments are cut off, the welfare recipient has a right to appeal to a member of the AFDC Board, who will hear the recipient's side of the case and make a decision. In Hilda's case, the decision to cut off her payments was upheld by the AFDC member at her hearing.

*Questions for Discussion*

(1) What are Hilda's interests in this case? Do they fall within the "life, liberty, or property" interests mentioned in the Constitution? Why or why not?

(2) What has happened to Hilda's interests in this case? To what degree, if any, have her interests been harmed?

(3) What are the interests of the government in this case? Why doesn't the AFDC Board conduct a hearing before the decision is made to terminate someone's welfare payments?

(4) Should Hilda be accorded some kind of due process?

(5) If Hilda is allowed due process, what kinds of procedures would be fair?

*Directions to Teachers:* Ask students to read each of the following opinions. Then ask each student to identify which opinion most closely matches his or her own, and to explain reasons why. If time permits, opinions can be used as the basis of a more formal classroom debate.

*OPINION I*

Welfare payments are a property interest for those individuals who qualify to receive them. However, while Ms. Peterson does have some property interest, her due process rights were not violated in this case, because she was given an opportunity to be heard after the benefits were ended. Due process does not always require very formal proceedings, and a full-blown hearing would unduly burden the government in this kind of case.

*OPINION II*

Welfare payments are a gift from the taxpayers. No one has a right to receive them. Therefore, no one can claim a property interest in them. Courts must act responsibly in ruling on due process claims, to ensure that we do not interfere with proper legislative and agency functions. The agency acted responsibly in providing some minimal hearing procedures, which were more than sufficient. If every welfare case had to be heard

before the termination decision was made, millions of taxpayer dollars would be wasted, both in the expense of the hearing processes, and in the continuation of welfare payments to individuals who should not be receiving them.

*OPINION III*

Welfare payments are indeed a property interest for those who are eligible to receive them. Moreover, it is brutal and unconscionable for the government to terminate payments to people who may well deserve to continue to receive them. For a mother with three young children, even one day without the necessary income can be a horror. The interest of saving money by prompt termination of payments to possibly ineligible recipients does not outweigh the interest of ensuring no unjust interruption of payments to people who really need the income. Ultimately in this kind of case, the defenseless children are really the ones who must suffer. Process is due to all the Ms. Petersons of the world, and it must be given before the decision is made to end payments.

(*Note:* Opinion III paraphrases the majority opinion of Justice Brennan in *Goldberg v. Kelly*, 397 U.S. 254 [1970], a case with a set of facts which parallels those given in this case study. Opinion II paraphrases Justice Black's vigorous dissent. Opinion I represents a compromise position.)

# Day 3.

## Legislative Drafting Exercise

*Problem:* State X has had this law on the books for a number of years:

> The parent or guardian of any child under the age of 18 may commit such child to the care of the Superintendent of Central State Mental Hospital for observation and diagnosis. If the Superintendent finds, after the observation and diagnosis period, that said child suffers a mental illness, upon consent of the parents the Superintendent may detain the child for care and treatment for any length of time deemed necessary.

John Doe, 14-years-old, posed behavioral problems for his parents and teachers since he was a small child. After several years of a variety of unsuccessful treatments, John's parents applied for his committment to Central State, and John was admitted. A suit was brought on John's behalf, alleging that his commitment violated his right not to have his liberty curtailed without due process of law. Attorneys for John's parents and for State X argued that John's due process rights were protected by the actions of his parents.

The Supreme Court of State X upheld a lower court finding in John's favor. The court held that a child's due process rights did exist independently of the parents' actions, and that those rights could only be protected by according the child an opportunity for a hearing on the issue of commitment. At minimum, said the court, the child should have an independent advocate, and an opportunity for a hearing if so requested.

The legislature of State X now faces the task of rewriting the statute. There are three distinct positions among the legislators:

a. that group which feels that the legislature should conform exactly to what the State Supreme Court said, including no more and no less than what the court intended and ordered;

b. a group which feels that the court's decision did not go far enough, and that the statute should be rewritten to include extensive procedural protections for the child;

c. a group that feels that the court, once again, is interfering with family life, and usurping the authority of parents; this group wants to rewrite the statute to conform to the letter of the court's decision, but keep the spirit that parental authority over children has primacy.

*Directions to Teachers:*

Step 1: Students may be given this problem for homework several days before the class in which it will be discussed. As part of a homework assignment, students may be instructed to:
- (a) decide which group of legislators they find themselves most in sympathy with;
- (b) roughly rewrite the statute reflecting their policy position.

(*Note:* If teachers prefer these activities to be done during class time, this activity may take one and one-half class periods.)

Step 2: Divide class into three groups to represent the various legislative positions.

Step 3: Each group of legislators works as a group to rewrite the statute according to their stated positions (students bring to the groups the drafts they wrote for homework).

Step 4: At the end of the rewriting time, a spokesperson for each group reads the new statute to the class. If time and board space permit, the drafts might be written on the board; overhead projectors would also be helpful for this process.

Step 5: Discussion. (The scope of this step depends upon time allotment.) The discussion may take a full-scale legislative debate format, with each proposal being introduced, debated, amended and voted upon. With less available time, teacher may simply lead the class in a comparative analysis of the three different statutes.

Step 6: Conclusion. Questions to raise include:
- What did this exercise teach the students about due process?
- Was this action by the state legislature necessary? How else might John Doe's due process problem been resolved?
- Should children have due process rights vis-a-vis the decisions of their parents in cases such as this? In what other kinds of situations might the same problem arise?

(*Note:* In *Parham v. J.R.*, 99 S. Ct. 2493 [1979], the Supreme Court upheld a Georgia statute similar to the one cited in this exercise. While upholding the dominant role of parents in deciding to commit a child, the Court also found that the independent determination of the doctor was sufficient to protect minimum due process requirements.)

# Days 4&5.

## Mock Administrative Hearing

Through participating in a simulated zoning hearing students will be able to apply the concepts of due process which they have learned in previous exercises, to examine the utility of due process, and to draw some conclusions concerning the availability and meaning of the due process guarantee in citizens' daily lives.

*Problem:* Upland is a quiet, unassuming town. It consists of blocks of neat, unpretentious single-family homes, mostly constructed of brick and clapboard. There is a small shopping district, including a drug store, shoe repair shop, sandwich shop, bakery, hardware store, and Clyde's, the town tavern. The residents of Upland can trace their roots here for several generations. The majority of the homes are inhabited by married couples with children. Several generations live in some of the homes.

While all seems well at first glance in Upland, the mayor has been worried by recent census reports hinting that young couples in their twenties and thirties are moving out of Upland at a rapid rate. From what the mayor has been able to learn, these young adults are unhappy with the slow pace of life in Upland, and the lack of entertainment or social diversity.

Concerned with finding a way to slow down the exodus, the mayor talks to a developer friend. The developer agrees to buy some properties at the edge of town to convert them into an entertainment center, including a movie theater, restaurant, and night club.

The properties bought by the developer are zoned for single-family houses only. Also, the zoning for the entire town prohibits sale of liquor by the drink, although Clyde's was able to get an exception so long ago that no one can remember the circumstances.

The developer applies for an exception to the zoning regulations. The zoning commission schedules a hearing, and half the town turns out for the event.

These individuals testify at the hearing:

*For the exception*
The developer
The mayor
A local resident
*Against the exception*
Clyde's owner
A minister
A local resident

*WITNESS STATEMENTS*

*The developer:* "As I envision this development, it will be a very tasteful, totally harmonious part of this community. It will be planned to allow minimal change in the local landscape and neighborhood character. It will be on the outskirts of the community, so as not to interfere with the privacy of the residential areas. Ultimately, I'm sure, it will enhance everyone's property value."

*The mayor:* "I have known this developer for years, and I have the highest confidence in the plans that are being designed. More important, we may not have a town to worry about in a few years, if we don't move on this now. The plans are exciting, and certainly guaranteed to keep our young people, the future of Upland."

*A local resident:* "I am 30-years-old. My spouse and our child are planning to move into the city. We both work there, anyway, and there's little reason to return here each night, except to sleep. Whenever we want to see a movie or have a quiet drink, we have to go to the expense of getting a sitter and driving into the city. Nobody I know would be caught dead in Clyde's; it's a crummy place."

**Young folks are moving out of Upland as if the place were on fire; will a new entertainment center keep them around (and what does this have to do with due process)?**

*Clyde's owner:* "This whole action is part of the mayor's slanderous attempt to put me out of business. Clyde's has a proud tradition of serving this town for 75 years. But I didn't support the mayor in the last election because the mayor's policies are going to destroy this town. Young people wouldn't leave if the mayor wasn't encouraging them to do so."

*A minister:* "I speak not only for my congregation, but on behalf of all the churches in town. We don't need another drinking establishment. Lord knows Clyde's gives us enough trouble. We have nothing against a nice entertainment spot, but we don't want all kinds of offensive movies coming into town. We think this whole problem can be solved in ways that won't destroy the peace and beauty of Upland. We ask the zoning commission to deny this exception, while we work on other solutions to the entertainment problem."

*A local resident:* "We've been getting along fine for years. Now this upstart mayor brings in some city friends with plans to clog our streets with traffic, give alcohol and who knows what kind of entertainment to our young people, and ruin our neighborhood. The mayor and zoning commission have no right to allow such destruction of our property and lives. People who don't like it here should leave."

*Directions to Teachers*

Step 1: With the whole class, have class read the fact pattern and witness statements.

Step 2: Questions for Discussion:
(1) What are the most important facts?
(2) What is the legal issue?
(3) What are the arguments on each side?
(4) Does anyone in this case have a *right* to this hearing, or is the process being allowed at the discretion of the zoning commission?

Step 3: Describe the Hearing Process:
(1) Zoning commissioners take places.
(2) Chair calls meeting to order and announces the issue.
(3) Chair calls witnesses, all in favor first, then all opposed.
(4) Each witness is allowed to make a statement. Then members of the commission may question.
(5) Commission deliberates, votes, and announces decision.

Step 4: Appoint Roles:
(1) three to five zoning commission members, including a chair;
(2) witnesses:
*For the exception*
Mayor
Developer
Resident
*Against the exception*
Clyde's Owner
Minister
Resident
(3) Assistant counselors to help prepare witnesses

Step 5: Small Group Work:
(1) Students divide into three groups: zoning commission, witnesses pro, witnesses con;
(2) Zoning commission members develop questions they want to ask each witness;
(3) Witness groups discuss strategy, including arguments to emphasize, points to downplay.

Step 6: Conduct Hearing

Step 7: Board Deliberation and Vote

Step 8: Questions for Debriefing:
(1) Did all the interested parties get treated fairly?
(2) How could the procedure have been made more fair?
(3) Was the decision based on the result of a fair proceeding?
(4) Was the decision just?
(5) What responsibilities do citizens have to act to protect their due process right? □

# Making Government Fair

## The due process clause is slow and sometimes inefficient, but it demands that government play by the rules

George Galland

I was asked to discuss the subject of due process. Asking a lawyer to talk about due process in just a few minutes is like asking a theologian to talk for 20 mintues about God. It's vitally important to lawyers, in many ways the very stuff of our work, and whole volumes can be and have been written about its smallest nuances.

But beneath all the words is one simple idea – that due process helps keep government accountable, helps it play by the rules. It's a major – if little-understood – part of the Constitution's arsenal.

### Two Little Clauses

There are two due process clauses. The one in the Fifth Amendment to the Constitution has been with us from the adoption of the Bill of Rights. It applies only to the federal government.

The other one is in the Fourteenth Amendment, adopted after the Civil War. The Fourteenth Amendment contains a grab-bag of provisions. In one of those provisions is a sneaky little phrase which says, "no state shall deprive any person of life, liberty or property without due process of law." That is stuck in almost as an afterthought in the Fourteenth Amendment, which had many more important purposes at the time. This amendment applies to the states – and by extention to local government – so it's used more often than the Fifth Amendment.

For the first 80 years or so, the due process clause of the Fourteenth Amendment had a history substantially different from its current use. It was used by courts in a *substantive* way. That is to say, it wasn't just a matter of what procedures ought to be followed – it was a matter of what the substance of the enactment was. Some statutes were held to be so unfair as to violate the very substance of due process.

The due process clause, for its first 70 or 80 years, was a weapon the courts used to get rid of legislation that interfered with what they thought was good and proper.

For example, courts often used it to get government off the backs of big business. That was done notoriously during the Depression, when many New Deal laws were struck down before Roosevelt scared the Court into shifting course. The courts used the due process clause to strike down all sorts of legislation which in their view unfairly limited the right to own and control property. For a while it was used to strike down anything that looked like social security.

The courts did a number of other things with the due process clause in its first 80 years. For example, starting in the 1920s, the courts used the due process clause of the Fourteenth Amendment as a way of imposing the Bill of Rights on the states. Very few of the rights guaranteed there apply to the states at all. The First Amendment doesn't mention the states; it just applies to Congress. But the courts have incorporated the guarantees of the Bill of Rights and made them applicable to the states because they have decided that due process of law somehow or other means that you have to have those guarantees. So the due process clause, in that respect, has become a very important substantive source of rights that people enjoy against state and local government.

That's not what happened to the due process clause, though, in the last 20 years, when there has been a complete shift in the meaning of the clause. For the last 20 years the name of the game with the due process clause has been procedure.

### Making Government Fair

As we all know, every day the government does all sorts of things to all of us that affect us in one way or another. And in the Fifth and Fourteenth amendments this clause says that the states and Congress shall not deprive any person of life, liberty or property *without due process of* law. Now that suggests to lawyers that you *can* deprive somebody of life, liberty or property but you have to use something called due process to do it. And the issue then became what kinds of procedures do you have to follow as a government when you're going to do those things to people.

What was responsible for the transformation of the due process clause? I don't know, and nobody else knows either, but I have some nonprovable theories. Two important events woke the country up to using the due process clause to impose some limits on governments.

The first was the experience of McCarthyism. McCarthyism demonstrated dramatically the unfairness of government. It showed that a government left unchecked to follow whatever procedures it wanted could be quite dangerous. When the reaction to McCarthy set in, people saw how many reputations had been ruined and how little had been achieved when legislators and governmental procedures rode roughshod over people. The public began to believe that some sort of check was necessary.

And so we began to get the courts looking at the procedures of bureaucratic agencies and asking, "Is this fair?" "Are these agencies doing what their own regulations say they are supposed to do?" "Are they giving people an opportunity to give their side of the story before the agencies act?"

If the excesses of the McCarthy period got it going, what put it into full gear was the war on poverty. In the 60s, lawyers began to start asserting the rights of the poor. The due process clause became an absolutely spectacular tool for them.

A lawyer who is representing somebody poor can't really do much about that person's poverty. You can't generate income if the person doesn't have any. What you can do, though, is get in the way of efforts to take away what the person has. If there are procedures which give some sort of entitlement to a poor person, you can use those procedures to try and make it tougher for the government to deny that person the things that the law apparently entitles him to.

When the war on poverty got into full gear, lawyers, in name of due process, managed to persuade the courts to impose quite stringent procedures on the government whenever the government wanted to take some sort of action that could be prejudicial. For example, back in the late 1960s, the Supreme Court decided that you couldn't garnishee a person's wages before judgment.

It may seem obvious that you have to sue somebody in a law suit and win before you can garnishee their wages, but that wasn't the case before. In a decision called *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969), the Supreme Court decided that this procedure violated the due process clause. Then the Court decided that you couldn't attach somebody's property before you got a judgment against him. That was a decision called *Fuentes v. Shevin*, 405 U.S. 67 (1972). And in a real high watermark of due process, the Court decided, in *Goldberg v. Kelly*, 397 U.S. 254 (1969), that a person on welfare couldn't have his or her welfare grant taken away without a prior hearing, with a lawyer present and all sorts of procedural protections. This was a typical example of how, during the war on poverty and in the spirit that prevailed at the time, lawyers were using the due process clause to slow down the government when it wanted to take something away. That produced a body of cases in the Supreme Court, back in the Warren Court era and the very early Burger Court era, which didn't have to be limited at all to poor people or poverty programs.

The lower courts began to take up the cudgel, and for a while just about everything the government was doing was declared unconstitutional under the due process clause. Those were great days to be a plaintiff's civil rights lawyer, I can tell you. You charged into court and you showed them what the procedure was and you said that doesn't give us an adequate opportunity to be heard before it happens to us, and the judge said you're right, it's unconstitutional, next case.

## The Tide Turns

I can tell you from personal experience how that era began to come to an end, because my law firm represented the plaintiffs in the case. It's possible to pinpoint the high watermark of due process and when the tide began to flow out.

The case was called *Arnett v. Kennedy*, 416 U.S. 134 (1974). It was a great case. Wayne Kennedy worked for the Office of Economic Opportunity. He was a disciple of Saul Alinsky at the University of Chicago. He had his office organized to the teeth and was a tremendous thorn in the side of the administrators. At some point he gave a press conference where he all but called his boss a crook, said the program wasn't running as it should, and made a lot of other accusations – all of which, incidentally, I think were entirely true. The government fired him. He came to us and said, "I've been fired." And we said: "Did they give you a hearing before they fired you?" and he said, "No, we're not entitled to one under the federal regulations."

I was just a kid then, but my partner said, "That doesn't sound constitutional to me. They've got to give you hearing before they fire you." He charged in to court with his affidavits and said: "We didn't get a prior hearing before he got fired, and that is unconstitutional." A very good judge agreed that the statute was unconstitutional, and the government appealed to the Supreme Court.

The case had wrapped up in it everything that is important for you to know about how the due process clauses are being interpreted now. In the Supreme Court the issue was a federal statute which goes back to the days of Fighting Bob LaFollette. It says that a civil service federal employee can be discharged only for such cause as promotes the efficiency of the service. He or she has to be fired for cause; there has to be a reason. But the statute did not give you the right to a hearing before you were fired. In fact, the statute didn't really give you the right to any particular kind of hearing. So the question was, "Do you have to get a hearing under the due process clause before you are fired?" Another way of looking at it was, "Do you have to have any kind of hearing at all?"

When the Supreme Court got into that issue, they went back to the words of the due process clause, which they generally hadn't done in the cases up to then. It says that "no person shall be deprived of life, liberty or property without due process of law." The first question that Justice Rehnquist asked was, "Where is the property?" It's clear that nobody was depriving Wayne Kennedy of his life. Nobody was depriving Wayne Kennedy of his liberty. But were they depriving him of his property? So then the next question was, from a lawyer's point of view, "What is 'property,' what does property mean?" We said: "Property doesn't just mean your bank accounts. Property under the due process clause means any sort of entitlement that the law gives you. Whether it's the entitlement to hold on to your suit and tie or the entitlement to have welfare benefits or the entitlement to be fired only for cause." But does the fact that this statute gives you the right to be fired only for cause give you a property right under the due process clause?

## What Process is Due?

After that issue, the next question was, supposing that it is property, what process is due for the government to deprive you of that property? Do they have to give you a hearing? If they give you a hearing what kind of hearing does it have to be? Do we have to have lawyers involved? When does the hearing have to take place? Can it take place before they fire you, or is it ok if they give it to you within a reasonable time after they fire you? If they give you a hearing, who has to make the decision? Can the guy who decided to fire you be the hearing officer to decide whether your case is meritorious or not?

So you can see that this one case bound up all of the issues that go into an analysis under the due process clause.

Here's how they decided the case in the Supreme Court. There were five opinions produced by the Arnett case. The Court went completely to pieces. No opinion got more than three votes. It was one of those watershed cases where all of sudden the Court confronts a bunch of difficult issues for the first time and no consensus is possible in any one of them.

Justice Rehnquist had his response to the property issue. He said, look at this statute. You're saying that this statute gives you a property interest because it gives you the right to be fired only for cause. But this statute also gives you no right to a

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hearing. How can you say on the one hand that you've got a property interest not to be fired and on the other hand rely on the very same statute that doesn't provide for a hearing? Congress didn't have to pass a statute giving you any right to be fired for cause at all, but it did pass this law, and you've got to take the bitter with the sweet. Maybe it said for cause, but if it doesn't give you a hearing right, you've got no property right at all. He got three votes for that proposition.

Everybody else said no, you've got a property right, the right not to be fired unless for cause. And then the question was, what process is due? Five justices out of nine decided that you had to have a hearing, a fair hearing, but the hearing can come *after* you were fired. It didn't have to come before. That is not much of a consolation to a person who is out of work and has to depend on the Civil Service Commission to get back to work, but they said that was due process.

And that in a nutshell is the Kennedy case. From that point on, it was no longer easy to get in the way of what the government wanted to do. First you had to show that you had a property right, then you had to show that the procedures that had been given to you were not what were "due." And as time has gone on, for the last 11 years, it has become harder and harder to prevail on both of those issues. It used to be that the courts would find a property right almost anywhere you look. Now it's getting harder to demonstrate that anything other than what you actually physically own is indeed a property right. And the courts have become much more conservative about what kinds of procedures are necessary in order to give you due process.

## How Judges Decide

The due process clause is a very complicated piece of law to unravel. There are a million subquestions, and lawyers make a fine living doing nothing but arguing due process cases, although they are all on the defendant's side now. But underneath all of the lawyers' arguments about the meaning of this and that, what is going on is quite simple. The due process clause, in a sort of inefficient, slow way, does represent the general fairness requirement that the Constitution imposes on the government.

I believe that when all is said and done, judges decide due process cases by saying, "Was this fair?"

Fairness, as all of these developments show, is an incredibly unstable concept in our society. Things that we regarded as absolutely fair for 100 years, all of sudden became entirely unfair. Things that we regarded as unfair have become fair.

The pendulum has been swinging back and forth, and will continue to swing back and forth. For example, back in the 1920s, a substantial number of people thought it wasn't unfair for the state to involuntarily sterilize someone, with procedures which I think today would be regarded as laughable. (See *Buck v. Bell*, 274 U.S. 200 (1927).)

During the McCarthy period, neither the Supreme Court nor any substantial number of people thought it was unfair to summarily take a fellow off of his job in the cafeteria of a Navy installation because somebody had alleged he was a security risk. (*Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).)

## Old Standards

For a hundred years, most people thought it was fair to garnishee a debtor's wages before you got a judgment as to whether he or she owed you the money. Most people in this country thought it was fair that when you had a lawsuit against somebody you were able to attach the person's property before you got a judgment, because you were afraid that the person might scoot out of the state and avoid having to pay you if you won.

People didn't think about these practices. If you told them that those things were unfair, they would have said, "What are you talking about? Here is a nitwit, can't you sterilize him? Here is a person somebody said is a communist, can't you fire him summarily? Here is a person who owes me money, can't I attach his wages? Can't I seize his house? What are you talking about?"

But times change. These things begin to be regarded as unfair. At the height of the due process revolution, if you want to call it that, we were able to come within one vote of convincing the Supreme Court that it was unfair to fire a federal employee and not give him a full-fledged lawyer's-type hearing before you fired him. A lot of people thought that the Supreme Court's decision in that case was unfair.

And then the pendulum began to move the other way. Our notions of what is fair have begun receding. People who assert that government ought to have checks on it and hearings before it takes these kind of actions are on the defensive. A new kind of argument is surfacing in the courts and in academia, which says that these procedures get in the way of government efficiency. Having all of these due process protections before a government can act is making it hard to run the government, and is leading to economic inefficiency.

## What is Fair?

In back of those kinds of arguments, I think, are questions about fairness. Is it all that unfair to cut somebody off of welfare before you give him a hearing? Why can't we give him a hearing in the next week or two? Isn't that good enough? Is it all that unfair to fire an employee if we give him a hearing in the next five or six months and give him his job back with back pay if he happens to win?

All of these illustrations, and many, many more, show that one of the least stable notions in a society is what particular things are fair and what particular things are unfair. What is going on with all of the lawyering under the due process clause, all of these categories and subcategories and fine points and nitpicking, is that there is some general notion that fairness is required on the part of the government. If we get too far away from that, according to current notions, courts will strike it down. If we're within some reasonable distance of what seems to be fair by judges as they dimly reflect the general attitudes of the population, it will be sustained.

## Summing It Up

Is all this due process worth it? What would we be like if we didn't have a due process clause? That is like saying what would my uncle be like if he were my aunt.

In some form or another, a system which allows courts to review government action the way ours does will always impose some sort of fairness requirement. What is unique and wonderful about the due process clause is that that's what it is explicitly for. The world is full of governments that don't have any requirement of fairness. Those governments tend to run more efficiently than ours does – and they are a lot worse.

The people who want to cut back on the scope of the due process clause are really asking to get the people off the backs of the government. But the fact of the matter is that we have a due process clause, and as long as we have judges who are authorized in law suits to interpret it, they're going to interpret it. Whether they say they are intepreting it in with regard to the intent of the framers, or whether they say they are interpreting it in light of contemporary standards, they will be doing the same thing. They will be taking their current notions of what is fair and they will be applying them. □

# Justice

**Making Wrongs Right/Grades K-6** — Dale Greenawald

Slug Signorino

This activity is designed to help primary students to analyze situations where a wrong has occurred and offer recommendations for corrective justice.

## Objectives

To apply the concept of corrective justice and develop critical thinking and problem solving skills. To emphasize that courts are to help those who were wronged, not just punish people.

## Procedures

The teaching time is approximately 30 minutes for grades K-3 and approximately 45 minutes for grades 4-6. This lesson is a natural for a community resource person from the justice community (e.g., a lawyer or judge).

Explain that after a case is decided and a person is found guilty a court has several functions. It wants to protect society so that the person can't hurt anyone else. It also wants to help the guilty person improve himself/herself. It also wants to punish the guilty person so that he/she won't break the law again. Finally, the court wants to help the person who was hurt.

Read each case. Ask students to explain what happened. Ask what might be done by those involved to correct the situation. Why do they think that their solution is a good one? The resource person will critique responses.

### K-3 READINGS

1. Mike wrote on the bathroom walls. When he admitted that he had been the person responsible, the principal asked him how he might make things right.

   Ask the class for suggestions about what would be fair. What might Mike do and why should he do that? Why is this a good suggestion and how will it help? Critique answers in a positive manner—"what about?" "did you think of. . .?"
2. Sarah was shopping with a friend and she took and ate some candy without paying for it. When she tried to leave the store the manager asked why she hadn't paid for the candy she ate. Sarah did not have any money to pay for the candy. She doesn't have any money anywhere. What can Sarah do to make this wrong right?
   A. Have the class brainstorm solutions and how they might make things better. What would be fair?
   B. What can the manager do if he wishes to stop this kind of behavior?
3. Three children are playing with matches at the picnic grounds, Blue Bell Shelter. A strong wind comes up and a spark sets the grass on fire. The shelter and many acres of land are burned, and several animals kept in a small zoo nearby are killed or injured. Before trying to make this wrong right, think about:
   - Some animals are gone forever.
   - The children are too small to rebuild the shelter.
   - The community cannot use the picnic grounds.
   - It cost a lot of money to put out the fire.
   - It costs a lot of money to rebuild the shelter.

   A. How can this wrong be made right? What would be fair?
   B. What can the children do even though they cannot make things the way they were?

### FOR USE WITH GRADES 4-6

Several students at Westmeadow Elementary School see a television ad for the Whiz-Bang Mighty Automobile toys. It looks like a really neat set of toys. In the ad it looks like the toys are several feet long and have motors. The set costs $45.00. Each of the children work very hard cutting grass, doing chores and helping neighbors for several months to earn money. They stop going to movies and buying candy so that they can save all of their money for the Whiz-Bang Mighty Automobile toys. When the toys arrive, they are about six inches long, made of plastic, and powered by a rubber band. All of the toys are broken within a few days of use. They simply fell apart. It is clear that the advertisement was misleading.

### CLASS DISCUSSION

1. What is fair?
2. What are the legal rights of the children?
3. How can this wrong be righted?
4. If you were a judge and this case came to your court, how would you right the wrong?

The resource person should explain the rights of the children in this case and what would probably happen if they complained to the county consumer affairs office. Also, if the students took their case to small claims court what might happen?

The lawyer or judge should tell about different programs and ways the courts can right wrongs. For example:

1. work release programs
2. community service sentences
3. paying back the cost of the damages (restitution)
4. repairing what can be fixed

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The following lessons are taken from several Law in a Free Society K-12 curriculum units on *procedural justice*, or due process. They are concerned with the fairness of the procedures used to gather information and make decisions.

The opening portion of the exercise could be used with students at any grade level 7-12. It introduces the concept of procedural justice with relatively simple examples.

For more advanced students (say those in high school) you might want to use the case of Sir Walter Raleigh (1603), which is included in this lesson, to illustrate how due process developed, and why the framers of the Constitution considered it vital. For younger students, use the case of John Lilburne (1637), in the box on page 15, and ask students to answer the same questions as follow the Raleigh case.

## Introduction

Give students the following situations and ask them if they are fair.

- You are accused of having done something wrong and are punished immediately without having had an opportunity to tell your side of the story.
- You and several friends have planned to meet to go together to see a motion picture. When you arrive at one of the friends' homes to discuss which show the group should see, you are irritated to find the group has already made the decision to see a film in which you have no interest, without waiting to give you an opportunity to express your opinion.
- A city council holds a hearing during which it decides how to spend five million dollars of tax money. Notice of the hearing is published so that interested individuals and groups from the community may attend the meeting and express their opinions on how the tax funds should be used.
- A suspected terrorist is tortured for five days before confessing to having participated in several bombings in which a number of people were killed.

Each of the above situations involves an issue of *procedural justice*. Procedural justice refers to the fairness of the *ways* certain things are done. More specifically, procedural justice refers to: (1) the fairness of the *ways* information is gathered, and (2) the fairness of *ways* decisions are made. (It *does not* refer to the fairness of the decisions themselves.)

The goals of procedural justice are: (1) to increase the chances that all information necessary for making wise and just decisions is gathered, (2) to ensure the wise and just use of information in making decisions, (3) to protect the right to privacy, human dignity, freedom, and other important values and interests such as distributive justice and corrective justice, and (4) to promote efficiency.

## The "Keystone of Liberty"

Scholars and others who have studied the subject of procedural justice often claim that it is the "keystone of liberty" or the "heart of the law." Observers of world affairs have sometimes claimed that the degree of procedural justice present in a country is a good indication of the degree of freedom, respect for human dignity, and other basic human rights in that country. A lack of procedural justice is often considered an indication of an authoritarian or totalitarian political system. Respect for procedural justice is often a key indicator of a democratic political system.

People who are not familiar with the subject often place less importance on procedural justice than on other values or interests. To the average person it is sometimes difficult to believe that the way information is gathered and the way decisions are made are as important as the outcome. Some might claim, for example, that it is not so important how the Congress or the president or the courts make their decision as what decisions they make. It is sometimes difficult to be as concerned about how the police gather evidence on a suspected murderer or what procedures are used in the trial of such persons as about making right decisions and punishing guilty persons and/or putting them in a place where they cannot hurt anyone else.

### WHAT DO YOU THINK

1. What situations have you observed in your home, school, and community in which issues of procedural justice have arisen?
2. Why might adherence to the goals of procedural justice be important in the private sector?
3. What might be the differences in adherence to the goals of procedural justice among democratic, authoritarian, and totalitarian political systems? What examples can you give from recent or historical events?

## Fair Procedures: The Trial of Sir Walter Raleigh (1603)

Ask students to read the following account of the arrest and trial of Sir Walter Raleigh. Then ask them the questions that follow.

Sir Walter Raleigh (1554?-1618) was one of the most colorful figures in English history. Soldier, sailor, explorer, poet, statesman, scientist – Raleigh seemed to do well in almost everything he tried.

As a young man, Raleigh caught the attention of Queen Elizabeth I of England, who was impressed by his handsome appearance, sharp wit, bold advice, and daring exploits. A fierce fighter and expert seaman, Raleigh rapidly became one of the queen's favorites.

When Elizabeth died in 1603, Raleigh had the bad luck to anger her successor, James I. This gave Raleigh's enemies, and he had made many over the years, a chance to plot against him. They told the new king that Raleigh had plotted to overthrow him and put Lady Arabella Stuart on the throne. They claimed that he had planned this rebellion with the help of a man named Lord Cobham.

On the night of July 20, 1603, as Raleigh stood on the terrace of his home talking with friends, there was a loud knock at the door.

"In the name of his majesty, James I, open up," rang out a familiar voice.

Suddenly the door was flung open and Sir Robert Cecil, First Secretary to the king and Raleigh's sworn enemy, burst in. With him were several members of the king's guard.

"In the king's name I place you under arrest," Cecil said. "On what grounds?" Raleigh asked.

But Cecil would not reply and Raleigh was taken away. His friends dared not protest.

Raleigh was questioned by Cecil in private. He had no chance to know the full charges against him or to confront his accusers. He was not permitted the help of a lawyer. Instead he had to rely only on his quickness, and wit, and basic knowledge of law and the current political situation.

During the time that he was being questioned by Cecil, Raleigh learned that the First Secretary had tricked Lord Cobham into bringing charges of treason against him by telling Cobham that he, Raleigh, had accused Cobham of that crime.

A wave of hopelessness swept over Raleigh. If the king wanted him dead, there was little he could do. Judges had lost their offices and juries had been put in jail for acquitting prisoners that the king wanted found guilty.

There was almost no evidence against Raleigh. While he may have known something about the plot against the king, he was not a conspirator.

Raleigh was brought to trial on November 17, 1603. The proceedings, which were directed by a group of commissioners, took place behind locked doors.

Among the commissioners at Raleigh's trial was Lord Thomas Howard, who had fought with Raleigh as a soldier and hated him. There was Lord Henry Howard, who later admitted that he had actually started the plot against the king for which Raleigh was now being tried. Sir Robert Cecil, the man who had trapped Raleigh in the first place, was also one of the commissioners.

Raleigh had prepared himself as well as possible. But since he did not have the help of a lawyer, this was a difficult task. All Raleigh was allowed in the way of a defense was ink and paper with which to take notes. He could not speak until he was given permission to do so, and this permission was almost never given. Whenever Raleigh rose to protest a point in the prosecution's story against him, or to tell his own version about what his involvement in the plot actually was, he was silenced immediately.

The "confessions" written by Lord Cobham were the most important evidence used against Raleigh. Raleigh asked that Lord Cobham be brought to court so that he could face and question him.

Lord Cobham was alive and could have been brought to the trial. But the commissioners were afraid that in this way Raleigh could prove his innocence. They refused to let Raleigh face his accuser.

The commissioners took just fifteen minutes to find Raleigh guilty. He was sentenced to be executed but, on the day his sentence was to be carried out, Raleigh's punishment was reduced. He spent the next thirteen years, until 1616, as a prisoner in the Tower of London. Whenever Raleigh would ask to speak with the king, in order to have his case reopened, his request was always denied.

## Evaluating Whether Procedures Are Fair

1. Information Sought or Decision to be Made
   - What is the information being sought? (Evidence of whether Raleigh was involved in a plot to overthrow the king.)
   - What is the decision being made? (Whether Raleigh was guilty of treason.)

2. Discovery and Use of Information

   a. *Comprehensiveness*
   To what degree does the procedure being used increase the chances that all information necessary for a wise and just decision is discovered?
   - What steps furthered this goal and how? (None).
   - What steps did not further this goal and how? (Raleigh was denied the right to speak at his trial, to have witnesses on his side, to have a lawyer help him answer the accusations, or to confront and cross-examine his accuser.)

   b. *Public Surveillance*
   To what degree do the procedures used allow interested members of the public to observe how information is being gathered and/or used in the making of decisions?
   - What steps furthered this goal and how? (None)
   - What steps did not further this goal and how? (The trial was held in secret "behind closed doors.")

   c. *Effective Presentation*
   To what degree do procedures enable interested persons to effectively present information they wish to be considered in the decision making process?
   - What steps furthered this goal? (None)
   - What steps did not further this goal and how? (Raleigh was denied the right to speak at his trial, to have a lawyer help him present his side of the case, and lacked enough knowledge of the law to have witnesses on his side and to cross-examine witnesses against him.)

   d. *Impartiality*
   To what degree has there been impartiality in gathering information and/or making decisions?
   - What steps furthered this goal and how? (None)
   - What steps did not further this goal and how? (Several of the commissioners hearing the case were Raleigh's enemies and were responsible for his arrest and trial. Also, judges and juries knew that if they set free someone the king wanted found guilty, they could be put in prison.)

   e. *Reliability*
   To what degree do the procedures insure the reliability of the infomation gathered?
   - What steps furthered this goal and how? (None)
   - What steps did not further this goal and how? (The person who had brought charges against Raleigh had been tricked into doing so by one of the commissioners in order to save himself from prosecution. Raleigh was not allowed to confront and cross-examine this person.)

   f. *Notice*
   To what degree do the procedures provide interested persons adequate notice of the reasons for

gathering information and/or the time of a hearing to enable them to make adequate preparation?
- What steps furthered this goal and how? (None)
- What steps did not further this goal and how? (Raleigh was not informed of the charges against him until long after his arrest or of details until his trial.)

h. *Detection and Correction of Errors*
To what degree do the procedures enable interested persons to review what was done in order to detect and correct errors?
- What steps furthered this goal and how? (None)
- What steps did not further this goal and how? (Raleigh was imprisoned for 13 years and his requests to speak with the king to have his case reopened were all denied.)

3. Protection of Related Values and Interests

a. *Privacy and Freedom*
To what extent, if any, does the procedure protect the right to privacy or freedom?
- What steps furthered this goal and how? (None)
- What steps did not further this goal and how? (Raleigh imprisonment)
- Did the procedure endanger freedom for the individual or society? (The lack of procedural safeguards endangered Raleigh and all of society.)

b. *Human Dignity*
To what extent, if any, does the procedure protect the right of each person to be treated with dignity no matter what his beliefs or actions may be?
- What steps furthered this goal and how? (None)
- What steps did not further this goal and how? (All of the procedures used violated basic rights to proper procedures, protection of the innocent, etc.)

c. *Distributive Justice*
To what extent, if any, does the procedure protect basic principles of distributive justice?
- What steps furthered this goal and how? (None)
- What steps did not further this goal and how? (Burden of imprisonment without being deserving of such treatment)

d. *Practical Considerations*
To what degree, if any, are practical considerations important in deciding whether or not a procedure is proper?
- What steps furthered this goal and how?
- What steps did not further this goal and how?

### What Do You Think

Were the procedures used for gathering information and making a decision fair? (Why)

What suggestions would you make, if any, for improving the procedures used? (Why)

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*This article adapts lessons found in three levels of the Law in a Free Society curriculum, a set of written and audio-visual materials containing six levels of sophistication for students from kindergarten through high school.*

### The Trial of John Lilburne (1637)

**Ask students to read the following historical incident. Use the questions that follow the Raleigh case (pp. 14-15) to evaluate the procedures used in this incident.**

During the 17th century in England, the kings created a court called the Court of the Star Chamber. The judges on this court were royal ministers. The Star Chamber had the authority to require any citizens to attend its sessions whether they were suspected of a crime or not. Persons brought before the court were often not accused of a crime or told why they were being questioned. Many times they were questioned at length in secret, even though there was no evidence against them, just on the chance that they might give information on themselves or others that would indicate a criminal act. Often people being questioned were tortured or threatened with cruel punishments if they failed to say what the judges or prosecutors wanted them to say.

John Lilburne was a Puritan. The Puritans were a group of people who criticized the official Church of England and had established their own church. They were unpopular with many of the people and, in particular, with some of the most important people in the government.

In 1637, John Lilburne was brought before the Star Chamber. He had just returned to England from Holland and was accused of sending unpopular and scandalous books from there to England. Lilburne said that he had the right to a trial in a regular court of law, to be given notice of the charges against him, to be formally charged with a crime, to have a lawyer help him answer the charges, to have witnesses on his side, to confront and cross-examine witnesses against him, and not to be forced to testify against himself. He was not given any of these rights.

For refusing to answer questions asked by the judges of the Star Chamber, Lilburne was fined, tied to a cart and whipped as the cart drove through the streets of London. He was then placed in a pillory in a public square with his back bared to the noon sun for two hours. He told everyone who would listen to resist the tyranny of the Church of England. Since he refused to be quiet, he was gagged so cruelly that his mouth bled. He was then placed in irons in prison for ten days without food.

After he was released, the English Parliament voted that he had been treated illegally, that he be paid to compensate for what he had suffered, and that the Star Chamber be abolished.

# About This Handbook

This is one of four special bar-school partnership handbooks on great constitutional themes: Liberty, Equality, Justice, and Power. The articles and strategies in these handbooks are reprinted from *Update on Law-Related Education*, a magazine published by the American Bar Association Special Committee on Youth Education for Citizenship and appearing quarterly during the school year.

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## Justice

**Justice: Developing Reasonable School Policies**/Secondary — Kenneth A. Sprang

Susan Wise

The exercise of the power of the state (and resulting encroachment on individual liberty) is probably felt by students most keenly in the school. Schools develop and implement numerous policies, from requiring certain courses to graduate to prohibiting students from smoking. One of the most controversial issues facing society today is that of mandatory drug and alcohol testing. This issue has triggered lawsuits and heated debate from coast to coast among those, on the one hand, who are concerned with the invasion of the state into the privacy of their bodily functions, and those, on the other hand, who believe such testing is necessary to eradicate the epidemic of drug and alcohol abuse facing our society.

These activities can be conducted by a teacher or a lawyer or other law professional. The discussion of the proposed drug-testing policy might be accomplished in one class period. Having students develop a policy and do the concluding activities will take longer

### What Is the Problem and How Do We Cope?

Lead the class in a discussion of the problem of drug and alcohol abuse. Perhaps students can do research into the scope of the problem, e.g., the financial cost, the number of persons affected. The issue is arguably not so much one of morality as health and safety. Addiction is an illness and it is threatening the well-being of the society.

1. What kind of problems are created by alcohol and drug abuse?
2. If such abuse costs taxpayers and consumers money through accidents, days missed from work, and similar

consequences, do the schools or society in general have a right to try to stop the abuse?
3. Do abusers have a "fundamental right" to use alcohol or drugs since it is "their body," if their use affects the well-being of society?
4. Abuse of drugs or alcohol is an illness that can be treated. Some persons appear to be genetically predisposed to addiction. Unfortunately, the addict or alcoholic rarely realizes that he or she has a problem until it is too late. In light of those facts, is it legitimate for the government, e.g., the school, to seek to identify persons with substance abuse problems?
5. How might you go about identifying such usage? required physicals for all students every year? every quarter? spies in the student body? random testing of students?
6. Consider mandatory urinalyses. Should these tests be given to all students or just randomly? Should some "reasonable cause" be present before requiring the test? What about random testing using a lottery, e.g., when a student's number comes up the student must submit to testing? What about testing of certain groups who are visible, such as athletes? Is such testing fair?

**A SAMPLE POLICY**

In the inset is a sample policy requiring random drug testing for athletes. Students should read the policy carefully, then discuss the following questions.

## Discussion Questions

1. Is it reasonable to apply the test only to participants in the athletic program?
2. What rights of students are affected by the policy? What rights or obligations of the school are involved?
3. Does the school have the right to regulate student activity away from school? What if such activity affects student behavior at school?
4. Note that the policy prohibits a student from having in the student's urine "any detectable trace of any illegal drug or alcohol" regardless of effect. Does it make any difference that the offense is having drugs or alcohol in the blood, rather than actually using the substances?
5. Is there any information you would like to have about the tests to be used in doing the urinalyses?
6. Look at the required rehabilitation program. Is there anything there that concerns you with regard to "due process" or "ordered liberty?"
7. Is the means of choosing the persons to be tested fair?
8. What problems do you see in having school personnel witness the urine collection? Why would the school include such a provision? What rights are at issue?
9. Assuming for discussion purposes that the policy is fair, is sufficient due process provided when someone tests positive?
10. What issues are raised by the option for the student to secure a second test at his own expense? What if the student has no money for the test? Who should pay for such a test?
11. Since the policy is therapeutic in that positive results cannot be used as evidence in support of suspension or other discipline, shouldn't it be permitted?

**ANSWERS AND GUIDELINES FOR DISCUSSION**

1. Perhaps not. The equal protection clause of the Fourteenth Amendment requires the government generally to treat all citizens equally. This "discrimination" against athletes might violate that constitutional provision.
2. Students' right to privacy is affected. The courts have found that students have no fundamental right to participate in extracurricular activities.
3. The school has a limited right to govern behavior outside of school if the out-of-school activities have some effect on the school or are related in some way. There is some question here, however, regarding whether the policy reaches too far. On the other hand, the policy prohibits having drugs or alcohol in the blood while in school; it does not expressly prohibit usage.
4. The offense here is in the nature of a "status offense" in which one is penalized for his status or condition. Some statutes allowing prosecution of "vagrants" and other persons based on status alone have been found to be unconstitutional. There is some question regarding the appropriateness of prohibiting the presence of the substance in the blood even if it has no physiological effect.
5. The students should look carefully at the technology of the test. As of this writing, the test used in the policy poses a serious risk of showing a positive reading when, in fact, the student has not used drugs or alcohol. The gas chromotography test, which is more accurate, may cost $300 or more per test. If the test is not accurate, there may be a due process violation. The skill of those administering the test should also be questioned, as well as guarantees that samples are actually those of the person being tested.
6. Failure to participate results in permanent suspension from the program—that may go too far to survive constitutional muster. In addition, rehabilitation therapy is required of all students, even though the drug or alcohol usage does not merit full-scale therapy.
7. The lottery seems as fair as any random system. However, testing based upon reasonable cause is probably necessary to be constitutional.
8. Here lies the most glaring privacy issue. Certainly there is an invasion of privacy in the test itself. The problem is exacerbated when a teacher watches the student collect the sample. On the other hand, how else does the school ensure that "clean" students are not switching samples with drug and alcohol users?
9. The policy seems to provide reasonable due process given the hearing and appeal rights.
10. The second test helps to preserve due process. However, if a student cannot afford the test and thereby is precluded from proving his innocence, the policy arguably fails to be fair and due process becomes a function of one's economic standing. Perhaps the school should pay if a student cannot or will not.
11. From a humanitarian perspective this proposal makes sense. However, a humanitarian motive cannot justify encroachment on the fundamental right to privacy unless the motive is compelling. Discuss with the class whether the need to help students who are

substance abusers is "compelling" enough to justify the invasion of their privacy.

### Developing a Policy

It is easy, of course, to sit back and criticize school policies. It is, however, much more difficult to develop them. How does one go about it?

1. Divide students into small groups of 4-5. First have them interview school administrators and/or school board members to find out how the district develops policies. What kind of information do they seek? What considerations must they weigh?
2. Have each group write a drug testing policy that is fair and strikes a balance between the rights and power of the school and the rights of students. The policy should, of course, be constitutional. (The model policy is almost certainly constitutionally defective.)
3. Have each group present the policy it has developed to the class. Let the class select the best policy based upon criteria of fairness, effectiveness, and constitutionality.

### Concluding Activities

1. Have students work in small groups to analyze current school policies for fairness, effectiveness, and constitutionality. Alternatively, students may want to develop written policies where none exist. Examples include:
   - School policy on drug and alcohol usage

**Board Policy '86–'87-149**
**Passed January 20, 1987**

WHEREAS the Board of Education of Earlham School District, Ohio, recognizes the existence of a severe and growing problem of substance abuse among school age persons in all areas of the country including this district, and,

WHEREAS the board has been alarmed in recent months by local and national news reports of young athletes who have died or become seriously disabled as a result of drug or alcohol use during or following participation in sports, and,

WHEREAS the board is mindful of the possibility of liability which may be incurred by it in the event that a student is allowed to participate in school-sponsored athletic events and suffers injury during the course of such participation due to his/her use of drugs or alcohol, and,

WHEREAS student athletes serve as role models for their peers in the schools and are often imitated in their behavior and attitudes, and,

WHEREAS participation in extracurricular athletics is a privilege not a right of students, we therefore enact the following policy:

1. Effective immediately, all participants in all extracurricular sports programs of this district at the high school level shall be subject to drug and alcohol testing procedures as specified herein;
2. Voluntary participation by a student in any such program shall henceforward be deemed to constitute consent of the student to these testing procedures;
3. Failure of a student to comply with any testing procedure authorized by this policy shall be cause for immediate and permanent ineligibility for participation in any school-sponsored extracurricular athletic activities.
4. These policies shall apply at all times during which a student is participating in any aspect of any extracurricular sport including but not limited to competitions, practice sessions, informal drills, instructional sessions, trips or meetings whether during schooltime or off-school hours or during vacations.
5. It shall be impermissible under this policy for any participant in any extracurricular athletic event to have in his/her urine any detectable trace of any illegal drug or alcohol regardless of the physiological effect which such trace may cause.
6. For these purposes, "illegal drugs" shall include any non-prescribed controlled substance as defined in Chapter 3719 of the Ohio Revised Code.
7. The superintendent of schools in cooperation with other school personnel will immediately develop a program of off-premises, off-school hours, substance-abuse training suitable for groups of students referred to counseling under this policy. The counseling will be provided at no cost to the student. The superintendent shall determine the time, place and content of a program under which each referred student receives not less than twelve (12) hours of training. A student referred to counseling will remain eligible to participate in sports except that any such student who fails, without an excused absence, to attend or fails to participate in good faith in any scheduled counseling session shall be immediately and permanently barred from further participation in any school-sponsored extracurricular athletic activities for the remainder of his/her high school career. Absences will be excused only in the case of verified illness of the student or serious family emergency.
8. Once each week during any week in which school-sponsored extracurricular athletic events or practices are in progress, a committee composed of the school's athletic director, vice principal and a third faculty member designated by the principal by random draw will select for alcohol/drug testing the names of five percent (5%) of the total number of students then participating in extracurricular athletics.
9. As soon as possible upon determination of the names of the students to be tested, the students selected shall be notified and required to comply with testing procedures.
10. Athletic coaches or other authorized school personnel shall witness the collection of urine

- School policy on censorship of newspapers, plays presented to the public, and similar material
- Policy governing students' access to automobiles during the school day
- Policy governing students' freedom to leave the campus during the day
- Policy governing usage of the school by outside organizations

2. Invite the school board's attorney to review the student-drafted policies and discuss them.
3. Have students write about the problem of substance abuse and their reaction to the concept of mandatory drug testing.
4. Have a panel discussion, perhaps including the principal, a school board member, and perhaps a student who has been disciplined under the policy. If the policy is directed toward athletes, perhaps the athletic director might be invited to participate on the panel.
5. Look at the Bill of Rights of the Constitution. Does it provide sufficient protection for all citizens, or perhaps too much. Our society has changed since the Constitution was drafted. What changes, if any, would you make in the Bill of Rights?

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*Kenneth A. Sprang, an attorney and adjunct professor of law at the University of Dayton School of Law, is a consultant to the Ohio Mock Trial Program. He is a former high school teacher.*

specimens from subject students to assure that valid samples are obtained.

11. Testing for drugs/alcohol as specified above shall be done by appropriate personnel of the student health office by the use of the EMIT d.a.u. (R) urinalysis test pursuant to the manufacturer's testing instructions.
12. If any such urine test shall indicate the presence of substances in violation of this policy, the athletic director shall immediately give the subject student and his/her parent(s) or guardian(s) notice of required substance abuse counseling as a condition of participation in any school sports activity pending further testing and/or administrative review as provided below. Said notice shall contain a statement of the student's rights under this policy.
13. Neither the result of any test administered under this policy nor a requirement of counseling under it shall be made public by school personnel except as it may be necessary to further investigate the matter under consideration. No indication of any action under this policy shall be placed in the student's permanent school record.
14. Any student whose test under this policy is positive for the presence of drugs or alcohol may apply to the athletic director of the school for permission to secure a confirmatory laboratory test at the student's expense. The confirmatory test must be requested by the student within forty-eight (48) hours of the receipt of the notice specified in Section 12 of this policy and must be performed upon a verified urine sample provided to the laboratory within seventy-two (72) hours of the receipt of said notice in order to insure that the drugs or alcohol detected in the first test have not cleared the system prior to the second test. The laboratory and the method of testing to be used must be approved in advance by the athletic director. If a timely and properly administered laboratory test is negative for the presence of the drug or alcohol detected by the original test, the first test result shall be considered null and void, and the student shall not be required to participate in counseling under this policy.
15. If requested to do so within (7) days after a Notice of Required Substance Abuse Counseling under paragraph 12 above is delivered, the principal shall, within fourteen (14) days of the date of the notice, conduct an informal hearing for the purpose of determining whether the student shall be required to participate in substance abuse counseling as a condition for participation in all extracurricular athletic events. At such hearing the student shall bear the burden of establishing by clear and convincing evidence that requirement is not warranted. The student and/or a parent or guardian may present affidavits (including his/her own) or other evidence as may be pertinent. The school shall be represented in such proceedings by a faculty member who may also introduce affidavits or evidence pertinent to the determination. Neither side shall be represented by counsel, and strict rules of evidence shall not be applied. Within five (5) days after the hearing the principal shall announce his/her decision whether or not to affirm the requirement of counseling. His/her decision shall be final.
16. Failure to timely request a hearing as provided in paragraph 15 shall be deemed a waiver of such hearing and shall result in the automatic imposition of a requirement of counseling as a condition for participation in extracurricular athletic activities.
17. The results of any test administered under this policy shall not be cause for or used as evidence in support of any academic suspension or expulsion from the curricular program of the school and shall not subject the student to any disciplinary procedure.
18. Nothing in this policy shall prevent the investigation, suspension or expulsion under the policies of this district or laws of the state of Ohio of any student reasonably suspected of drug or alcohol use where such suspicion arises independent of any test conducted under this policy.
19. Notice of this policy and its immediate effect shall be posted prominently in all schools in the district forthwith.

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***This policy was developed by the Ohio Mock Trial Program for use in its 1986-87 Mock Trial Competition.***

## Right to Counsel/Grades 9-12

Alan L. Lockwood and David E. Harris

Historical Pictures Service, Inc

This activity will help students explore three important points:

- the role of the lawyer in helping assure due process of law
- the difficulty of maintaining respect for law and for the rights of unpopular defendants in turbulent times
- the ethical dilemmas that have faced lawyers for many years

One of the great dramas of revolutionary history is provided by the Boston case of British soldiers accused of murder. The story of John Adam's difficult decision about whether to defend the soldiers provides a richly human element. But his decision has much wider ramifications. It encapsulates many of the themes that have run through this handbook: the struggle to solve problems through law rather than force, the growing respect for due process and legal fact finding, and the vital role of the lawyer.

### A Lesson for One Class Period

1. Students are assigned to read the episode (see below) and discuss the facts of the case.
2. Students then discuss the ethical issues.
3. The teacher/resource person leads a group discussion of one item from the Expressing Your Resoning activity.
4. The teacher/resource person guides the students in summarizing the main ideas raised during the discussion.
5. The resource person may wish to focus particularly on some of the ethical dilemmas for lawyers suggested by the Adams case. Should a lawyer accept the case of someone he or she knows is guilty? Should he or she accept the case of unpopular defendants, even at some personal risk? The resource person might use some examples from American history (the trials of the Haymarket anarchists, Sacco and Vanzetti, and the Scottsboro Boys) or use personal examples.

### A Young Lawyer's Dilemma

The decade of the 1760s was a period of growing tension between England and its American colonies. Attempts to tax the colonists triggered events that led to revolution.

The colonial reaction to one of many taxes, the Stamp Act, was swift and violent. On August 14, 1765, Andrew Oliver, the Crown-appointed stamp collector, had his effigy hung on a huge tree in central Boston that became known as the Liberty Tree. That evening a mob dragged the effigy to Oliver's elegant town house where they broke down the door and forced their way in. His furniture was destroyed and his family terrorized.

Twelve days later a raucous crowd made its way to the mansion of the colonial governor, Thomas Hutchinson. Hutchinson was dining with his wife and children. The crowd split the door with axes, plundering and gutting the house. They destroyed what they could not take away – china, rugs, clocks, furniture, and family portraits. Nothing remained but the roof, bare walls, and the floor.

Some of these protesters, led by Sam Adams, organized a group called the Sons of Liberty. Their aim was to turn street violence into political action.

British soldiers, in their bright red coats, were the visible objects of Boston's bitterness. The redcoats marched up

King Street in Boston with drums beating, fifes playing, and colors flying.

**THE HORRID MASSACRE**

The climactic conflict came in Boston the night of March 5, 1770. It was a chilly moonlit evening with a foot of packed snow on the ground. Down King Street, Private Hugh White of the Twenty-ninth British Regiment walked his solitary post. As Private White stood near his sentry box a group of rowdies jeered at him until he lost his temper and knocked one of them down with his musket butt. The commotion drew a crowd. White became a target for snowballs, chunks of ice, and lumps of coal. Frightened, he hurried to the Customs House. He found the door locked as the surging crowd shouted, "kill him, kill him!"

The crowd threatened to overcome the lone redcoat. Captain Thomas Preston, officer in charge, heard the uproar and led a relief party of seven soldiers to the rescue. At bayonet point Preston's group forced its way through the throng to reach White. Forming a line alongside White, the soldiers were showered with flying objects, catcalls, and taunts.

Some of the soldiers' faces were bloodied. One private, clubbed into the gutter, scrambled to his feet, shouted out, "Damn you, fire!" and pulled the trigger of his musket. The shot hit no one, but the other soldiers began firing. When the smoke cleared, five men lay sprawled in the snow, three dead and two others mortally wounded. The stillness was then broken by the thud and rattle of rammers as the soldiers loaded their guns once again. Captain Preston then ordered his men to withdraw across the street. The wounded and dead were carried away.

**LET THE LAW DECIDE**

Suddenly, all over the city, bells began to ring the alarm. An angry crowd of men appeared on the streets carrying any weapons they could find. Cries of "To arms!" echoed through the streets. Governor Thomas Hutchinson came immediately to King Street.

The governor struggled through the throng until he reached the State House. He appeared on the balcony, facing in the moonlight a seething, roaring, angry mass that filled the square below. Governor Hutchinson stood a moment and waited. "Go home," he said at last. "Let the law settle this thing! Let you also keep to this principle. Blood has been shed; awful work was done this night. Tomorrow there will be an inquiry." The crowd slowly dispersed. By three o'clock in the morning it was over.

Before sunrise a court of inquiry issued warrants for the arrest of Captain Preston and the eight soldiers. They were jailed to await their trial for murder. Sam Adams, leader of the Sons of Liberty, had already dubbed the incident the Horrid Massacre. Events of the night have survived in history as the Boston Massacre.

John Adams, a young lawyer, had heard sounds of violence the night before in the streets. He hurried home concerned about the safety of his family. The next morning he was met at his law office by a stranger named James Forest, a loyalist and friend of the accused British officer, Captain Preston.

Mr. Forest had just been with Captain Preston in jail. "Why are you here?" asked John Adams. Breathing hard, Mr. Forest begged Mr. Adams to undertake Captain Preston's defense. "His life is in danger," claimed Mr. Forest. "He has no one to defend him. Mr. Adams, would you consider—will you take his case?" Mr. Forest almost sobbed. The words came out in a rush. He had come to John Adams for two reasons: he could find no other lawyer to take the case, and Mr. Adams had a reputation for being a fair and decent man.

**ADAMS MUST DECIDE**

The implications of the decision facing John Adams staggered him. All other lawyers in the city had refused to defend Captain Preston or the other eight soldiers. They feared for their own lives if it became public that they were defending the redcoats. John Adams pondered the importance of having due process of law and impartial justice in the colonies. He expected that this trial would prove as important a case as had been tried in any court of any country in the world.

Walking home to dinner that night John Adams was thinking about his dilemma. A group of Sons of Liberty stopped him on the street and warned him against defending "those murderers." Tories (those loyal to the crown) urged him to take the case. "Nine Tories out of ten," John told his wife, Abigail, gloomily, "are convinced I have come over to their side." He was greatly disturbed at the thought that his own friends, the liberty group, would scorn him and that the loyalists would regard him a hero if he decided to take the case.

John learned that Governor Hutchinson was determined, should a jury convict, to urge a king's pardon for all eight men. On the other hand, John Adams' skill might actually persuade the jury to bring a verdict of not guilty. The governor preferred a verdict of not guilty to a royal pardon. If John Adams took the case, he wondered whether he would be viewed as a loyalist sympathizer doing the bidding of King George III.

Arriving at home one evening, he found a window broken. Abigail showed him two rocks she had picked up in the room. It was clear to John that if he accepted the case, his house and family would be placed in jeopardy.

The case would be difficult to win. It soon became known that of the 96 witnesses prepared to testify, 94 made it appear that the fault lay entirely with the soldiers.

It would take a defense lawyer a great deal of time to prepare to challenge their testimony. If John took the case, the months before the trial would be wholly taken up in preparation. The trial itself would last a long time. John feared bankruptcy if all his time were taken up with this trial. Little time would be left for other legal work and the handsome fees collected for it. Clearly, accepting the case would require financial sacrifice for John Adams.

John Adams wanted to make an honest fortune for himself and his family, to improve his small farm, and to educate his children. Were he to take on the harassing job of defending the redcoats he would be taking a different course. Besides, his family had special need of him at home these days.

Another thought occurred to John. In the back of his mind he had considered a career in politics. What

chance would he have of being elected to the legislature if he accepted the unpopular job of defending the British soldiers?

England certainly, and perhaps all Europe, would be watching the trial. John said to his friend Josiah Quincy, "It will serve our enemies well if we publish proof that the people's cause in America is led by a mere mob, a riotous and irresponsible waterfront rabble."

If John Adams took the case, most townspeople would think he was trying to screen murderers from justice. Yet, were the British not entitled to be defended against the charge of murder? John Adams struggled to reach a decision.

### Reviewing the Facts of the Case

1. Why did James Forest seek out John Adams to serve as the defense lawyer for the British soldiers accused of murder? (No other lawyer would take the case, and John Adams had a reputation for being a fair and decent man.)
2. Why did Adams think this trial would draw attention in other parts of the world? (He believed the handling of the trial would be viewed as a test of the American colonists' commitment to legal justice.)

### Expressing Your Reasoning

1. Should John Adams have accepted the job of defending the British soldiers? (In deciding whether John Adams should have defended the British soldiers, students might consider the obligations he may have had. Some possibilities include an obligation to himself, his family, his profession, the other colonists, the British government, or the principle of justice. Students could be asked which obligation, if any, was greatest, and they could be asked to state their reasons for ranking the obligations. Reasons supporting the position that Adams should have taken the case include: by accepting the case he would gain favor with the crown, the governor, and the Tories; under English tradition of law, an accused person is innocent until proven guilty and therefore entitled to a lawyer to wage a defense; due process of law would be set as a precedent in the colonies.)
2. Which would be the best reason for Adams *not* to take the case?
   - By accepting the case John would have risked being attacked by angry townsmen or having his house vandalized
   - John would have lost a lot of income by spending so much time preparing and trying the case
   - John might have hurt his political future by becoming known as the lawyer who tried to get the crown's soldiers off the hook
   - The liberty group in Boston was emerging as the chosen leaders of the people. As a faithful member of that group, John ought not to have done anything to undermine their influence
   - The troops were in Boston by order of the king and Parliament. Local citizens considered the soldiers unlawful foreign occupiers. The colonists did not consent to have the troops stationed in the city. Therefore, the soldiers were not entitled to the protection of the colonial courts, or a lawyer to defend them
3. After students have identified some reasons either for or against as better than others, they should be asked to explain why they made their selections. After eliciting their explanations, you may wish to list the following ways in which reasons may be characterized:

   A reason that emphasizes revenge against an offending party
   A reason that stresses the self-interest of one party in the dispute
   A reason that stresses the need to show compassion for one or more of the parties involved
   A reason that emphasizes following custom or tradition
   A reason that shows respect for legitimate authority
   A reason that shows concern for the welfare of society as a whole
   A reason that attempts to take into consideration the rights of all parties concerned

   Students may be asked if any of the above characterizations fits the reasons they selected. You may then discuss whether some of these types of reasons should be preferred over others. For example: Is a reason that shows respect for rule of law better than one that focuses on revenge?
4. Before the trial began John Adams came to believe that the soldiers were innocent of the charge of murder. Suppose John had believed that the soldiers were guilty as charged. Should he still have accepted the case? (In discussing students' answers, some considerations that might be raised are: A lawyer who believes a client is guilty may not be able to provide a good defense; one should not try to help a seemingly guilty suspect avoid punishment; if accused persons are acquitted by the work of clever lawyers, the victims of crime will be unprotected; a lawyer's professional obligation is to make the best possible case, regardless of personal opinions about a prospective client; if all lawyers refuse a case because they believe an accused person is guilty as charged, the accused will be denied the right to an attorney; under the law, no one is guilty until convicted in court.)

### Historical Note

John Adams did take the case of the British soldiers. All eight of them were found not guilty of murder, though two were convicted of the lesser charge of manslaughter.

The case had no detrimental effect on Adams's career – he was a revolutionary leader and ultimately the second president of the United States – but the case was a landmark in the development of due process of law in this country.

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## Searches Without Warrants/Grades 9-12

Steve Jenkins

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. . ." Does this mean that all searches are prohibited? (No, persons are only protected from "unreasonable searches and seizures.")

What is a reasonable search? Can a search without a warrant ever be reasonable? Brainstorm students' responses to these two questions. By brainstorming, the students will probably identify several situations in which they believe warrantless searches are reasonable (e.g., searches by metal detectors at airports).

Although the Fourth Amendment generally emphasizes the warrant requirement for legal searches, the courts have recognized certain circumstances where warrantless searches are considered legal. The following are examples of legally recognized warrantless searches:

- *Consent to Search.* If a person gives permission to law enforcement officers to search him or her, and his or her property, then such a search may be conducted without a warrant. Generally the courts have only recognized a person's right to consent for that which a person has control (that is, the person and the person's property). The courts have recognized a few circumstances where a person may give consent to search a third party (for example, a parent giving consent to search his or her minor child).
- *Border and Airport Searches.* These searches involve a type of implied consent (that is, everyone choosing to travel by air, or choosing to enter the country, is aware of the search that may be conducted). Specifically, the courts have recognized the right of customs officials at U.S. borders to examine vehicles, baggage, purses, wallets, or similar belongings.
- *Search Incident to a Lawful Arrest.* If a police officer arrests a person, the courts have recognized as legal the police officer's search of the arrested person and the area immediately surrounding the person. The courts have recognized this warrantless search in order to protect the officers from hidden weapons that the arrested person may have, as well as to prevent the arrested person from destroying evidence.
- *Stop and Frisk.* Much like the recognized warrantless searches incident to a lawful arrest, the courts, in order to provide additional protection for police officers, have upheld the right of a police officer to conduct a warrantless search if the officer believes that a person is acting suspicious. An officer is also permitted to conduct a warrantless search if he or she has reasonable suspicion that a person may be carrying a concealed weapon.
- *Vehicle Searches.* The courts have recognized a police officer's authority to search a vehicle for illegal substances (often referred to as contraband). However, the police officer must have probable cause to believe the vehicle contains contraband.
- *Plain View.* The courts have held that if an object connected with a crime is in plain view of a police officer acting lawfully, then the object can be seized without a warrant. For example, if a police officer is patrolling in a neighborhood and right in plain view observes several marijuana plants growing in someone's yard, the police officer may seize the marijuana plants without a warrant.
- *Hot Pursuit.* The courts have said that police officers in hot pursuit of a criminal suspect are not required to obtain a search warrant before entering a building that they have observed the suspect enter.
- *Emergency Situations.* The courts have upheld warrantless searches in the following emergency situations: searching a building following a telephoned bomb threat; entering a building after smelling smoke or hearing screams; and other emergencies involving preservation of life or health.

Ask students to consider the following cases and determine if, in their opinion, the warrantless searches were reasonable.

### Case 1

Railroad officials in San Diego, California, observed two persons loading a brown footlocker onto a train bound for Boston, Massachusetts. The officers became suspicious when they noticed that the footlocker appeared to be unusually heavy for its size. They also observed that talcum powder was leaking from the trunk. Talcum powder is often used to hide the odors of marijuana and hashish. The railroad officials reported these suspicions to the federal agents in San Diego. The federal agents relayed this information to federal agents in Boston, Massachusetts.

When the train arrived in Boston, several days later, federal narcotics agents were waiting. The agents had a police dog with them. The dog had been trained to detect marijuana. The agents did not have a search warrant. When the footlocker was removed from the train, the police dog reacted such a way that the agents had even greater suspicion that there were illegal drugs in the footlocker. A man drove his car up to the loading dock, and when he and some companions heaved the footlocker into the trunk of the car, the agents moved forward and arrested the man and his companions. An hour and a half later, the agents opened the footlocker and found a large quantity of marijuana.

The agents did not have a search warrant or the consent of the footlocker's owner. The agents claimed that the warrantless search of the footlocker was reasonable because it was incidental to an arrest. In addition, the agents claimed that the footlocker was in plain view in the car trunk when it was seized. The footlocker owner claimed that the warrantless search of his private property was a violation of his Fourth Amendment

protection against unreasonable search and seizure. *What do you think?*

1. What arguments might the federal agents make to justify this warrantless search?
2. What arguments might the footlocker owner make to justify suppressing the evidence seized during what he claims was an illegal search?
3. In your opinion, did the federal agents conduct a lawful, reasonable warrantless search? Briefly explain your answer.

**ANSWERS TO CASE 1**

1. Student answers will vary but may include the following: The federal agents might argue that the warrantless search was legal because it was a search incident to the lawful arrest of the footlocker owner who was suspected of possession of illegal drugs. The agents might also claim that the search and seizures fall under the "plain view" circumstances. That is, if the object (i.e., the footlocker) connected with a crime is in plain view of a police officer (i.e., federal narcotics agents) acting lawfully, then the object can be seized without a warrant.
2. Answers will vary, but may include the following: The owner of the footlocker might argue that a search incident to a lawful arrest only permits the federal agents to search him and the area immediately surrounding him. The footlocker was not within the immediate area, and besides, the owner was under arrest and in the police custody, and the footlocker did not pose a threat of hidden weapons; so if the federal agents wanted to search the footlocker, they should have presented their facts to a judge and asked for the issuance of a search warrant. After all, the federal agents actually had at least two days to take the information from the San Diego federal agents and apply for a search warrant based upon the facts presented by the railroad officials.
3. Answers may vary and students should give reasons to support their answers.

NOTE. This case is based on *United States v. Chadwick*, 433 U.S. 1 (1977). The U.S. Supreme Court held that the footlocker owner's Fourth Amendment rights had been violated. The Court ruled that placing personal effects in a footlocker protects them from unreasonable governmental invasions of privacy. The Court also agreed with the footlocker's owner that the federal agents should have applied for a search warrant. The Court said it was unreasonable for the government to search without a warrant when the agents had over two days and sufficient facts to obtain a search warrant from a judge.

## Case 2

A high school security guard noticed a student walking down the hall with large bulges in the rear pockets of the student's jeans. The security guard thought that the bulges appeared to be in the shape of pocket knives. The guard stopped the student and and asked him what he had in his pockets. The student told the guard that the bulges were pencils and he walked on. The guard asked to see the pencils, but the student continued to walk away. The guard shouted to the student to stop, but the student acted as though he didn't hear the guard. The guard caught up with the student, patted him down, and removed two knives from the student's pants pocket. Later that day, after being advised of his rights, the student admitted to police that he owned the knives.

The student was placed on probation by a juvenile court for possessing knives on public school grounds in violation of the California Penal Code. The student appealed his conviction, contending that the school security guard had violated the student's Fourth Amendment protections against unreasonable search and seizure; and therefore, since the knives had been seized illegally, the knives should have been suppressed as evidence against the student. School officials claimed that the security guard was fulfilling his duties under the California Education Code to ensure "the security of school district personnel and pupils and the security of the real and personal property of the school district."

1. What arguments might the security guard make to justify his warrantless pat search of the student?
2. What arguments might the student make to justify his claim that the seized knives should be suppressed as evidence?
3. In your opinion, did the security guard conduct a lawful warrantless search of the student? Briefly explain your answer.

**ANSWERS TO CASE 2**

1. Answers will vary but might include the following arguments: As a security guard he was responsible for protecting school personnel and pupils, as well as real and personal property of the school district. This duty is much like that of a police officer, and like a police officer, the security guard should have the right to stop and frisk a student for weapons if the guard reasonably believes that the student is behaving suspiciously and is likely to be armed. The courts have upheld these types of warrantless stop and frisk searches.
2. Answers will vary but might include the following arguments: The student might claim that the security guard did not have reasonable suspicion to stop him, let alone search him. Therefore the security guard's action was unreasonable and a violation of the student's Fourth Amendment protection from unreasonable searches and seizures.
3. Answers will vary and students should give reasons to support their answers.

NOTE. This case is based on a recent California case (181 Cal Rptr 856). The California Court of Appeal held that the security guard for the school was properly exercising his duties of employment. The guard was acting properly to protect the security of the school's personnel. Therefore, the security guard conducted a proper stop and frisk search.

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